No. [redacted]40

# In the Supreme Court of the United States

OCTOBER TERM, [redacted]1950

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UNIVERSAL CAMERA CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court below (D. 1-10)[1] is reported at 179 F. 2d 749. The findings of fact, conclusions of law and order of the Board are reported at 79 NLRB 379 (B. 1-25).

[1] The record filed by petitioner with this Court is in four sections, designated, Part "A" (Petition for Enforcement); Part "B" (Appendix to the Board's brief below); Part "C" (Appendix to the Company's brief below); and Part "D" (proceedings in the court below). Record references are designated accordingly. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's decision, succeeding references are to the supporting evidence.

## JURISDICTION

The decision of the court below was rendered on January 10, 1950, and its decree enforcing the Board's order was entered on January 25, 1950 (D. 1-10, 11-13). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the 1947 amendments to the National Labor Relations Act broadened the scope of court review of Board findings and orders.

2. Whether the fact that the Board has reversed findings of a Trial Examiner of itself detracts from the substantiality of the evidence which supports the Board's findings.

3. Whether the Board's findings are supported by substantial evidence on the record considered as a whole.

4. Whether the exclusion of supervisors from the definition of "employee" in the amended Act operates retroactively so as to preclude the Board from ordering the reinstatement with back pay of a supervisor who, prior to enactment of the amended act, was discriminatorily discharged for testifying in a Board proceeding.

## STATUTES INVOLVED

The statutory provisions principally involved are the National Labor Relations Act of 1935 (49

Stat. 449, 29 U. S. C. 151, *et seq.*), Sections 2 (3), 8 (4) and 10 (a); the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. II, 141, *et seq.*), Sections 2 (3), 8 (a) (4), 10 (c) and (e); and the General Savings Statute (61 Stat. 633, 1 U. S. C., Supp. II, 109). These provisions are set forth in the Appendix, *infra*, pp. 12-16.

## STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on August 31, 1948, issued its findings of fact, conclusions of law and order (B. 1-25). Briefly summarized, the facts as found by the Board are as follows:

Imre Chairman was employed by petitioner in August, 1943, as an assistant engineer in charge of a crew of maintenance employees (B. 14; 30). These employees were then interested in having the Company recognize International Brotherhood of Electrical Workers, A.F.L., hereinafter called the Union, as their bargaining agent, and Chairman advised them how to proceed (B. 14; 31-32). The Union filed a petition for certification and a hearing thereon was scheduled by the Board for November 26, 1943. At the request of the employees, Chairman appeared at the hearing to testify in their behalf. (B. 14-15; 32-35). He did not testify on November 26, however, because the case was continued to November 30. The Company, which was opposed to the effort of the em-

gineers to obtain representation through the Union,[2] attempted to dissuade Chairman from testifying on that date. On several occasions after November 26, Chairman was warned by his immediate superior, Plant Engineer Politzer, not to appear at the hearing if he didn't "want to be in bad graces with the company" (B. 15; 33-34, 46). Chairman, nevertheless, did testify on November 30, and his testimony conflicted with that of Politzer, Chief Engineer Kende, and Vice-President Shapiro (B. 15; 34-35, 43-44, 70).

On the evening of November 30, immediately after the termination of the hearing, Kende accosted Chairman and angrily accused him of falsifying his testimony (B. 2, 15-16; 35, 48-54). The next day, Kende, resentful because Chairman had testified contrary to the Company's position, undertook to find some excuse for terminating his employment. Searching for a pretext which would warrant Chairman's discharge, he questioned Politzer as to Chairman's work, and discussed his employment application with Personnel Director Weintraub (R. 2, 16; 55-56, 68-71). However Kende failed at that time to discover a suitable pretext. He therefore instructed Politzer to investigate further and to observe Chairman's work very closely (B. 2-3, 16; 56, 72). A few days later Politzer warned Chairman that the Company

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[2] See *Universal Camera Corporation*, 54 NLRB 1037, 1038, 1039.

officials "were after his scalp" and would try to find grounds to discharge him (B. 17; 36, 48, 77).

On December 30, Weintraub, the personnel manager, ordered Chairman to discharge one of the mechanics in his crew, and when Chairman refused, attempted to have Chairman removed from the plant by a militarized guard (B. 17-18; 38-39, 72-73). A serious argument followed, but it was finally settled when both men agreed to forget the incident (B. 18-19; 39, 51-53, 66-67). However, on January 24, 1944, Weintraub demanded that Politzer discharge Chairman. When Politzer refused to do so Weintraub went to Kende, who, over Politzer's objection, and without even calling Chairman to his office, or in any way investigating the matter, ordered that Chairman be fired (B. 3, 21; 57-59, 67-68, 74, 78).

Upon the foregoing facts the Board concluded that Kende had seized upon Weintraub's request as an excuse to discharge Chairman, and that Kende was actually motivated by his desire to eliminate Chairman from the plant because of Chairman's testimony at the Board hearing of November 30 (B. 3-5). In doing so the Board reversed the Trial Examiner, who had found that the discharge resulted from Weintraub's animosity toward Chairman because of the December 30 incident (B. 1-2, 23).

The Board ordered petitioner to cease and desist from discriminating against any employee be-

cause he had filed charges or given testimony under the Act, and to reinstate Chairman with back pay (B. 7-8).

Before the court below petitioner contended that the amendment to Section 10 (e) of the Act had broadened the scope of judicial review of Board findings; that, in any event, the fact that the Board had reversed the Trial Examiner was a factor detracting from the substantiality of the evidence supporting the Board's findings; and that the exclusion of supervisors from the definition of "employee" in the amended Act precluded the Board and the courts from remedying unfair labor practices committed under the Wagner Act and involving supervisory personnel. The court rejected each of these contentions, holding that the substantial evidence rule had not been changed; that the Board's reversal of the Trial Examiner did not affect the validity of the Board's findings; and that the amendment to Section 2(3) of the Act did not abate petitioner's liability for the discharge of Chairman, which occurred prior to the amendment and was preserved by the general savings statute (D. 1-10). The court decreed that the Board's order be enforced in full (D. 11-13). Judge Swan dissented (D. 10).

## ARGUMENT

1. We believe that the court below was correct in holding that the substantial evidence rule was not broadened by Section 10(e) of the amended

Act. But since its holding in this respect conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Pittsburgh Steamship Co.* v. *National Labor Relations Board*, decided February 17, 1950, not yet reported, petition for certiorari pending, No. 732, this Term, and presents a question of importance in the administration of the Act, we do not oppose the grant of certiorari to review this question.

2. Likewise, while we believe that the court correctly held that the Board's reversal of the Trial Examiner's findings does not, of itself, detract from the substantiality of the evidence which supports the Board's determinations, since this holding is in conflict with the cases cited on p. 13 of the Petition, we do not oppose the granting of certiorari on this point.

3. The question whether the Board's order is supported by substantial evidence on the record considered as a whole would seem to be interrelated with the questions as to the scope of review.

4. The facts of this case do not present the issue posed by petitioner's question number 4, "Whether the Board can extend the protection of the Act to a supervisor not an 'employee' as defined in the amended Act". The effect of the amended Act on the Board's authority to protect supervisors who testify in Board proceedings after its effective date is not here involved. When Chairman testified in November, 1943, he was an "employee" within the

meaning of the Act (*Packard Motor Car Company* v. *National Labor Relations Board*, 330 U. S. 485, 488), and was protected by it against discharge for testifying. Petitioner, when it discharged Chairman because he testified before the Board, violated Section 8 (4) of the Act, and then became liable to reinstate him with back pay.

The question presented, therefore, is whether Congress intended that the exclusion of supervisors from the definition of "employee" in Section 2(3) of the amended Act should have retroactive effect so as to remit liabilities for discriminatory discharges of supervisors which occurred prior to the effective date of the amendment. The amended Act and its legislative history clearly show that Congress did not so intend.

The amended Act contains no provision which prohibits the Board or the courts from remedying conduct which constituted an unfair labor practice under the original Act, where such conduct would not constitute an unfair labor practice under the amended Act. Section 102(c) of the House bill, which would have had the effect of prohibiting entry by the Board or enforcement by the courts of any order based on prior unfair labor practices unless the conduct continued to be an unfair labor practice under the amendments, was deliberately rejected in conference (see Section 102(c) of H.R. 3020, 80th Cong., 1st Sess.; Conf. Rep., H. Rep. No. 510, 80th Cong., 1st Sess., p. 61).

Accordingly, it has uniformly been held that the general savings statute, 1 U.S.C. 109, applies to liabilities which were incurred under the Wagner Act, and that for the purpose of enforcing such liabilities the original Act must "be treated as still remaining in force." *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 236-238 (C.A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. 2d 485, 488 (C.A. 6); *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C.A. 5); cf. *Lovely* v. *United States*, 175 F. 2d 312, 316 (C.A. 4).

This Court has twice denied certiorari to review the question whether the amendments preclude the Board and the courts from requiring an employer to reinstate with back pay supervisors who were discriminatorily discharged prior to the effective date of the amendments. *Budd Mfg. Co.* v. *National Labor Relations Board*, 332 U. S. 840, and *Vail Mfg. Co.* v. *National Labor Relations Board*, 334 U. S. 845. In the *Budd* case the Court granted certiorari with respect to the cease and desist provisions of the Board's order, and remanded the case to the Court of Appeals to consider the effect of the amended Act on those provisions, but denied certiorari with respect to the provisions requiring reinstatement of supervisors with back pay. The Court of Appeals for the Sixth Circuit construed this action as a holding that the general savings

statute is applicable to and preserves orders requiring reinstatement with back pay of supervisory employees discharged prior to the amendments. *Foreman's Ass'n of America* v. *Budd Mfg. Co.*, 169 F. 2d 571, 575, certiorari denied, 335 U. S. 908. In *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131, 137 (C.A. 4), where, as here, the Board's order was entered after the effective date of the Amended Act, the court concluded that the question here presented "has been decided by the Supreme Court in the case of *Budd Mfg. Co.* v. *National Labor Relations Board*, 332 U. S. 840, * * *." There are no contrary decisions.

Since the order here involved does not require the employer to observe for the future a relationship with his supervisory employees which the law no longer requires him to observe, the holding of the court below in *National Labor Relations Board* v. *Brozen*, 166 F. 2d 812, relied upon by petitioner, which dealt with an order regulating a future bargaining relationship, is not in point. See *Budd Mfg. Co.* v. *National Labor Relations Board*, 332 U. S. 840.[3]

[3] Petitioner did not challenge below and does not now question the propriety of that provision of the Board's order which requires it to cease and desist from discharging or otherwise discriminating against any *employee* because he has filed charges or given testimony under the Act. Such conduct remains an unfair labor practice under the Act, as amended (Section 8 (a) (4)).

## CONCLUSION

For the reasons set forth above, we do not oppose the grant of a writ of certiorari limited to the first three questions presented. As to the remaining question the petition should be denied.

Respectfully submitted,

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MAY 1950.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

* * * * *

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce * * *.

* * * * *

2. The relevant provisions of the Labor Manage-

ment Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. II, 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"SEC. 2. When used in this Act—

* * * * *

"(3) The term 'employee' shall include any employee, * * * but shall not include any individual employed * * * as a supervisor, * * *.

* * * * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

* * * * *

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

* * * * *

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the

District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * "

* * * * *

"SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from

becoming or remaining a member of a labor organization; but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

* * * * *

3. The relevant provision of the General Savings Statute (61 Stat. 633, 1 U. S. C., Supp. II, 109) is as follows:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. * * *

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